IN THE

Supreme Court of the United States

October Term 1971

No. [illegible]

In the Matter of

BEST RE-MANUFACTURING COMPANY,

Debtor.

DON ROTHMAN, Receiver,

Petitioner,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner, Don Rothman, Receiver, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered December 8, 1971.

Citations to Opinions Below.

The Referee in Bankruptcy's Order is unpublished and unreported, but is printed in the Appendix hereto at pages 1 to 9. The District Court entered an Order (printed in the Appendix at pages 10 to 12), adopting the Findings of Fact and Conclusions of Law of the Referee in Bankruptcy, and its Order affirming

the Referee is unreported. The opinion of the Court of Appeals is reported at .... F.2d .... and is printed in the Appendix hereto at pages 13 through 15.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered December 8, 1971. No petition for rehearing was filed. Jurisdiction of this Court is invoked pursuant to 11 U.S.C. §§47c and 716, and 28 U.S.C. §1254(1).

Questions Presented.

1. Is the telephone number of a subscriber who becomes a Debtor in a proceeding under Chapter XI of the Bankruptcy Act "property" as that term is used in the Act?

2. Does the Bankruptcy Court have summary jurisdiction to enjoin the disconnection of the telephone services furnished a Chapter XI debtor?

Statutes and Tariffs Involved.

(a) Statutes.

11 U.S.C §11a(15), §2a(15) of the Bankruptcy Act:

> "2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> ....

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;"

11 U.S.C. §110a(5), §70a(5) of the Bankruptcy Act:

"§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located. . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: . . ."

11. U.S.C. §711, §311 of the Bankruptcy Act:

"Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

(b) Tariffs of the Pacific Telephone & Telegraph Company.

"The Pacific Telephone and Telegraph Company
San Francisco, California

SCHEDULE CAL.P.U.C. NO. 36-T
4th Revised Sheet 49
In Lieu of 3rd Revised Sheet 49 Rejected
Cancels 2nd Revised Sheet 49

RULE NO. 11

DISCONTINUANCE AND RESTORATION OF SERVICE

A. Reasons for Discontinuance of Service

1. A Customer may have his telephone service discontinued by giving notice of his desire on or before its effective date. The utility will hold the customer responsible for payment of all bills for service furnished until the date specified by the customer.

   The utility will hold a customer about to vacate premises responsible for all service rendered up to and including the date service is to be discontinued, or the date the utility discovered the removal.

2. Nonpayment of Bills

   Monthly bills shall be considered past due if they are not paid within 15 days after date of presentation.

   a. All Classes, Types and Grades of Exchange and Toll Service

      Service to a particular premises, separately served and billed, may be temporarily or permanently discontinued for the nonpayment of a bill for the service furnished, provided the bill therefor has not been paid within the period specified below and the utility informs the customer with a written 5 day notice:

      Thirty calendar days after presentation when bills are rendered yearly;

Five calendar days after presentation of special bills;

Fifteen calendar days after presentation of all other bills.

Issued: July 14, 1967

Issued by: Adrian C. Cassidy, Vice President

Effective: August 14, 1967

Resolution No. T-6342"

"The Pacific Telephone and Telegraph Company
San Francisco, California

SCHEDULE CAL.P.U.C. NO. 36-T
3rd Revised Sheet 58
Cancels 2nd Revised Sheet 58

RULE NO. 15

OWNERSHIP AND USE OF INSTRUMENTALITIES ON CUSTOMERS' PREMISES

1. GENERAL

A. The Utility shall own, furnish, and maintain all facilities including instrumentalities, inside wiring, protective apparatus, and other equipment necessary to provide telephone service, except as may be otherwise specified in the tariffs. All facilities provided shall conform to the established construction standards of the Utility.

B. All instrumentalities and equipment furnished by the Utility in connection with a customer's service shall be carefully used and only duly authorized employees of the Utility shall be allowed to connect, disconnect, move, change, or alter in any manner, any or all such instrumentalities and equipment.

Issued: April 28, 1969
Issued by: Adrian C. Cassidy, Vice President
Effective: May 29, 1969"

RULES

17. TELEPHONE DIRECTORIES, LISTINGS AND NUMBERS

(D) Changes in Telephone Numbers

The assignment of a number to a subscriber's telephone service will be made at the discretion of the Company. The subscriber has no proprietary right in the number, and the Company may make such reasonable changes in telephone number or central office designation as the requirements of the service may demand.

Issued: November 29, 1965

Issued by: R. M. Cunningham, Vice President

Effective: December 30, 1965

Dec. No. 69942"

"The Pacific Telephone and Telegraph Company
San Francisco, California

SCHEDULE CAL.P.U.C. NO. 36-T
3rd Revised Sheet 72
Cancels 2nd Revised Sheet 72

RULES

23. PRIORITY OF ESTABLISHMENT AND SUPERSEDURE OF SERVICE

(B) SUPERSEDURE

An applicant who otherwise qualifies for the immediate establishment of service under Section (A) of this rule may supersede the service of a subscriber when the applicant is to take service on the premises where that service is being rendered and a written notice to that effect from both the subscriber and applicant is presented to the company and where an arrangement acceptable to the company is made to pay all unpaid charges and to assume all obligations of the outgoing subscriber in connection with the service existing on the date of supersedure, including any charges and obligations for advertising.

Issued: October 1, 1964

Issued By: R. M. Cunningham, Vice President

Effective: November 1, 1964"

"The Pacific Telephone and Telegraph Company
San Francisco, California

SCHEDULE CAL.P.U.C. NO. 36-T
3rd Revised Sheet 32
Cancels 2nd Revised Sheet 32

RULES

5. SPECIAL INFORMATION REQUIRED ON FORMS

(A) Contracts.

Each contract form for telephone service will contain substantially the following provisions: This contract shall at all times be subject to such changes or modifications by the Public Utilities Commission of the State of California as said Commission may from time to time direct in the exercise of its jurisdiction.

(B) Bills.

1. Each regular monthly bill for telephone service will contain the following notation:

This bill is due and payable on presentation and becomes delinquent fifteen days thereafter. If payment for telephone service on this bill or a previous bill has not been made before becoming delinquent, such service may be discontinued. In this event restoration may not be made until the telephone charges have been paid. In addition, a deposit may be required to restore service.

Issued: August 19, 1968

Issued by: Adrian C. Cassidy, Vice President

Effective: September 19, 1968"

RULE NO. 5

SPECIAL INFORMATION REQUIRED ON FORMS

(B) Bills - Continued

4. Disputed Bills - Continued

(b) Southern California Exchanges

(1) Each regular bill for telephone service will contain the following notation: Should you question this bill please request an explanation from the Utility. If you thereafter believe you have been billed incorrectly, the amount of the bill should be deposited with the California Public Utilities Commission, State Office Building, 107 South Broadway, Los Angeles, California 90012, to avoid discontinuance of service. Make remittance payable to the California Public Utilities Commission and attach the bill and a statement supporting your belief that the bill is not correct. The Commission will review the basis of the billed amount and make disbursement in accordance with its findings.

Failure to make such deposit with the Public Utilities Commission within fifteen days after notice by the Utility that such deposit must be made or service may be discontinued, shall warrant the Utility in discontinuing the service without further notice.

Issued: August 19, 1968

Issued by: Adrian C. Cassidy, Vice President

Effective: September 19, 1968"

RULE NO. 6

ESTABLISHMENT AND RE-ESTABLISHMENT OF CREDIT

B. Re-establishment of Credit

1. A customer whose service has been discontinued for nonpayment of bills will be required to pay any unpaid balance due the Utility for the premises for which service is to be restored and may be required to pay a reconnection charge as prescribed in Rule No. 11 under 'Restoration—Reconnection Charge' and to re-establish credit by making the deposit prescribed in Rule No. 7, before service is restored.

2. An applicant who previously has been a customer of the Utility and during the last twelve months of that prior service has had service temporarily or permanently discontinued for nonpayment of bills will be required to pay any unpaid balance due the Utility, and will be required to re-establish credit by making the deposit prescribed in Rule No. 7.

Issued: January 28, 1969

Issued by: Adrian C. Cassidy, Vice President

Effective: February 28, 1969"

"The Pacific Telephone and Telegraph Company
San Francisco, California

SCHEDULE CAL.P.U.C. NO. 36-T
Original Sheet 48-A

RULE NO. 10

DISPUTED BILLS

In case of a dispute between the customer and the utility as to the correct amount of a bill rendered by the Utility for service furnished to the customer, which cannot be adjusted with mutual satisfaction, the customer may deposit with the Public Utilities Commission of the State of California at its office in the State Building at San Francisco, California 94102, or in the State Office Building, 107 South Broadway, Los Angeles, California 90012, the amount claimed by the utility to be due. Deposit checks, money orders, etc., must be made payable to the 'Public Utilities Commission, State of California.' Upon receipt of said deposit, the Commission will investigate the complaint and communicate its findings to the parties.

Failure on the part of the customer to make such deposit with the Public Utilities Commission within fifteen days after notice by the Utility that such deposit must be made or service may be discontinued, shall warrant the Utility in discontinuing the service without further notice.

Material on this sheet formerly on Sheet 48.

Issued: July 14, 167

Issued by: Adrian C. Cassidy, Vice President

Effective: August 14, 1967"

RULE NO. 11

DISCONTINUANCE AND RESTORATION OF SERVICE

A. Reasons for Discontinuance of Service (Continued)

2. Nonpayment of Bills (Continued)

b. Application of Unused Portion of Prepayments or Deposits for Telephone Service.

Telephone service will be temporarily or permanently discontinued and the amount of the charges therefor will be charged against the deposits on hand, any amount of unused deposit will be returned to the customer but in no case in less than the above prescribed number of days after the first day of presentation of that bill.

c. Former Service

A customer's telephone service may be temporarily or permanently discontinued for nonpayment of a bill for the same class of service (residence or business) previously furnished at a location served by the Utility, provided said bill is not paid within 15 days after the date of presentation at the location of the new or existing services.

Issued: July 14, 1967

Issued by: Adrian C. Cassidy, Vice President

Effective: August 14, 1967

Resolution No. T-6342"

CONNECTIONS OF CUSTOMER-PROVIDED EQUIPMENT AND SYSTEMS

II. REGULATIONS APPLICABLE TO EXCHANGE SERVICE

A. GENERAL PROVISIONS

1. The Utility shall own, furnish, and maintain all facilities including instrumentalities, inside wiring, protective apparatus, and other equipment necessary to provide telephone service, except as may be otherwise specified in the tariffs. All facilities provided shall conform to the established construction standards of the Utility.
2. All instrumentalities and equipment furnished by the Utility in connection with a customer's service shall be carefully used and only duly authorized employees of the Utility shall be allowed to connect, disconnect, move, change, or alter in any manner, any or all such instrumentalities and equipment.
3. The customer will be held responsible for loss of or damage to any equipment or apparatus furnished by the Utility, unless such loss or damage is due to causes beyond his control.

B. Customer-Provided Terminal Equipment

1. Customer-provided terminal equipment may be used with the facilities furnished by the Utility as specified in I. preceding and B.2. through B.6. following.

2. Network Control Signaling

Satisfactory performance of the exchange and message toll network requires continuing functional compatibility of the network control signals and the central office equipment involved. To assure such continuing compatibility, network control signaling in the furnishing of exchange and message toll service shall be performed by equipment furnished, installed and maintained by the Utility.

Issued: April 28, 1969
Issued by: Adrian C. Cassidy, Vice President
Effective: May 29, 1969"

Statement of the Case.

These proceedings were commenced on October 14, 1969 by the filing of a petition under §322 of Chapter XI of the Bankruptcy Act (11 U.S.C. §722) by Best Re-Manufacturing Co. ("Best" or the "Debtor"). The petition was referred to a Referee in Bankruptcy who appointed A. J. Bumb, Esq., as Receiver. (Because of the death of A. J. Bumb, Don Rothman, Petitioner herein, was appointed successor Receiver on March 25, 1970.) The original Order of appointment, among other things, authorized the Receiver to take possession of the Debtor's assets and continue its operations, and then ordered that:

> "all utility companies supplying utilities and/or services to the . . . Debtor shall continue to supply said services to the Receiver, which said services shall from the date of the Receiver's qualification and taking over possession, constitute administrative expenses of the estate, said services to be continued and not terminated until further Order of this Court."

On January 21, 1970, The Pacific Telephone and Telegraph Company ("PT&T") filed its Petition to modify that portion of the Order which directed all utilities to continue furnishing existing services to the Debtor. That Petition alleged, *inter alia*: (a) an alleged past due obligation of $5,327.52 from the Debtor for telephone service; (b) the right of PT&T to discontinue telephone service to the Debtor for alleged non-payment of the pre-bankruptcy bills; (c) the willingness of PT&T to render telephone service to the Receiver under the existing numbers, if the Receiver superseded and made an arrangement satisfactory to PT&T

for payment in full of the alleged pre-bankruptcy charges; (d) the willingness of PT&T, upon the refusal of the Receiver to supersede, to render telephone service to the Receiver under different telephone numbers without requiring payment of the pre-bankruptcy charges, but without any referral service from the Debtor's old numbers to the new numbers; (e) the unwillingness of PT&T to continue telephone service to the Receiver on the Debtor's existing telephone numbers unless the Receiver complied with the above supersedure procedure; and (f) that PT&T had notified the Receiver in writing that if the pre-bankruptcy charges were not paid by him, service over the existing telephone numbers would be disconnected.

The Receiver offered to pay, and the Order of October 16, 1969 directed him to pay, the current operating and service charges to PT&T to maintain service on the Debtor's existing telephone numbers. PT&T refused to maintain such service under these conditions.

At the hearing which led to the Order from which this Petition arises, the following evidence was elicited: Best was engaged in the re-manufacturing and reconditioning of used automotive engines for resale, conducting its business in Los Angeles and San Diego, California. It had four telephone numbers at its Los Angeles location and one at San Diego. These telephone numbers were listed by PT&T in its various telephone directories, including the Classified Directory or "yellow pages". Approximately 97½% of Debtor's orders were initiated or obtained over the telephone. Of $2,100,000 gross billings by the Debtor during 1969, $2,047,500 was attributable to the use of the Debtor's existing telephone numbers.

PT&T stipulated, and the Referee found as facts, *inter alia,* that:

(a) Debtor's customers consistently reached the Debtor for the transaction of business at the telephone numbers assigned to the Debtor by PT&T and continued to call the Debtor's place of business at those numbers.

(b) "Debtor's business will be interrupted and dislocated to some extent if service is discontinued over the above described telephone numbers."

(c) "A business established for awhile does acquire a certain goodwill because of a telephone number, which number becomes important to the business, although telephone numbers are changed from time to time for reasons beyond the control of the subscriber."

(d) The telephone equipment on the Debtor's premises is owned by PT&T and in order for PT&T to render the same telephone service to the Debtor over the same telephone numbers, no additional equipment is needed on the premises. However, in order for PT&T to render any telephone service to the Debtor, PT&T has other equipment and facilities located elsewhere, such as, but not limited to, its central offices, which equipment and facilities are not located on the Debtor's premises.

(e) If telephone service over the same telephone number or numbers is continued by PT&T to the Debtor or the Receiver, no change would be necessary in PT&T's central office equipment. However, if the telephone number or numbers are changed, it would be necessary for PT&T to make

changes in its central office equipment, although no changes would be necessary in the telephone equipment located on the Debtor's premises.

(f) The Receiver did not request any enlargement or change in the telephone service rendered to the Debtor prior to the bankruptcy proceedings.

(g) On October 16, 1969, the date of the initiation of this proceeding, the telephone numbers used by and listed to the Debtor had not been disconnected by PT&T, were in full service and were being used by the Debtor.

On May 25, 1970, the Referee entered his Order modifying his earlier Order, and permitted PT&T to disconnect the telephone numbers of Debtor for nonpayment of charges incurred prior to October 16, 1969, provided Receiver received telephone service over other telephone numbers. On July 9, 1970, the Receiver posted a cash bond of $5,078.39 with the Bankruptcy Court as a result of which a Stay Order was entered by that Court. The Stay Order provided that PT&T would continue to furnish telephone service to the Receiver at the Debtor's old numbers pending final resolution of the instant case. The condition of the bond was the failure of the Receiver to prevail on review or appeal. On September 16, 1971, Best was adjudicated a bankrupt.

ARGUMENT FOR GRANTING WRIT.

The Holding by the Court Below That the Bankruptcy Court Does Not Have Summary Jurisdiction to Restrain Disconnection of a Debtor's Telephone Number Will Substantially Diminish the Possibility of Successful Rehabilitation in a Majority of Chapter XI Proceedings.

A. The Court Below Erred in Holding That a Telephone Number Does Not Constitute "Property" as That Term Is Used in the Bankruptcy Act.

There are now two circuits which have taken the position that a Chapter XI court does not have the power to prohibit a telephone company from disconnecting a debtor's telephone number unless all past-due bills are paid by the Receiver: the Second Circuit in *Slenderella Systems of Berkeley v. The Pacific Telephone & Telegraph Co.*, 286 F.2d 488 (2d Cir. 1961), and the Court below. Thus, there is no conflict between the circuits to support this Petition. There is, however, the paramount question of whether this Court will permit the frustration of the only purpose of a Chapter XI proceeding, rehabilitation of the debtor.

In an age when lack of telephonic communication effectively cuts one off from the rest of the business world, two Circuit Courts of Appeal have seen fit to hold that a telephone number is not "property" of a Chapter XI debtor or, alternatively, if it is property, that the Bankruptcy Court does not have summary jurisdiction to protect that property and maintain its value. Given these holdings, a Receiver undertaking to administer a debtor's business in a Chapter XI proceeding has but two alternatives: (1) to pay a preference to the telephone company for pre-Chapter indebt-

edness, a type of payment which is specifically condemned by §60 of the Bankruptcy Act (11 U.S.C. §96), as well as by §70d of the Act (11 U.S.C. §110d) (which prohibits certain post-Petition transfers); or (2) to refuse to pay and destroy all chance of a successful administration. If he chooses not to pay, a receiver will be furnished telephone service, but at a new number with no referral service from the debtor's old number. Lack of referral service means that the party placing a call to the old number is told that the number has been disconnected. He is not told that the debtor has a new number, much less what that new number is. Only the unusual or persevering caller would then call "information" in an effort to determine whether the debtor is still operating and, if so, at what telephone number it can be reached. This is the position into which the Receiver is put by the decision below. The overwhelming importance of the telephone, together with the monopolistic bargaining power of the telephone company, give him what is truly a Hobson's choice.

As in *Slenderella,* PT&T relied in the instant case upon its Rule 17D (Schedule Cal. P.U.C. 36-T, 2d revised sheet (1963)), which provides that "[t]he subscriber has no proprietary right in the number . . ."

In relying upon this tariff provision and *Slenderella* for the propositions that there is no property right in a telephone number, and that the Bankruptcy Court does not have summary jurisdiction based upon possession or use of the telephone number by the Debtor at the time of the filing of the Chapter XI petition, the Court below negated the whole function and purpose of Chapter XI proceedings.

In interpreting the word "property" as used in §70a-(5) and §311 of the Bankruptcy Act (11 U.S.C. §711), emphasis is generally placed upon the meaning given to that term by the courts of the state in which the Bankruptcy Court sits. Nevertheless, "it is clear, of course, that in the event of any conflict between the state law and the Bankruptcy Court, the state law must yield". 4 *Collier on Bankruptcy* 1034 (14th Ed. 1971).

Turning first to California law, while no case exists which is precisely in point, nevertheless the trend of recent cases is toward an expansive redefinition of the concept of "property". In *Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 180 P.2d 321 (1947), the Court, quoting from *Walsh on Equity* said:

> "It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier holding that equity will protect property rights only. Business rights of all kinds discussed in the preceding Chapter are not property in the legal sense. Nevertheless they are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting rights in lands or chattels."

While it is clear, therefore, that the Supreme Court of California does not regard "property" in a legalistic sense, there is no predicting what effect would be given to the California Public Utility Commission's tariffs by that Court. This Court, on the other hand, has concluded that any important business right which has substantial value to the business and its creditors is to be considered "property" for purposes of the Bank-

ruptcy Act. In *Segal v. Rochelle*, 382 U.S. 375 (1966) this Court invalidated *Slenderella's* overly restrictive rendering of the term "property", stating:

> "The main thrust of Section 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his Petition. To this end, the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." [citations omitted]. (382 U.S. at 379.)

To give to the states, by statute or regulatory rule, the power to make and unmake "property" to bring it within or without the Bankruptcy Court's jurisdiction, would thwart the purposes and intent of the Bankruptcy Act. That Act leaves it to the Bankruptcy Court itself, apart from State law, to determine the meaning of "property" within its own purposes. As stated in *Board of Trade v. Weston*, 243 Fed. 355 (7th Cir. 1917):

> ". . . it would be strange if the dominant grant to Congress to legislate upon bankruptcy and insolvency, and which, when exercised, supersedes State legislation respecting these matters, should nevertheless be subordinate to the right of each State to determine what is or shall be property subject to the terms of the Bankruptcy Act."

See also *Board of Trade of City of Chicago v. Johnson*, 264 U.S. 1 (1924), and *Garber v. The Bankers' Mortgage Co.*, 27 F.2d 609 (D.C. Kan. 1928).

The value of a going business depends upon goodwill and, in this modern day, ease of communication. Protection of property rights, therefore, must have the

business meaning indicated in the cases cited above, and not the narrow construction announced by the Court below. The time has come to depart from the self-defeating concept of *Slenderella* that property can be removed from the jurisdiction of the Bankruptcy Court by some regulatory rule which arbitrarily defines it as non-property. It would be shocking indeed if the California Public Utilities Commission were permitted to negate the Bankruptcy Court's jurisdiction over a valuable asset of this estate.

Considering the trend exhibited by the modern cases broadening the concept of "property" to include various forms of intangibles, the decision by the Court below is wholly without logic in its concept of basic values. No effect was given by the Court to the concept that a telephone number and telephone service are, in today's world of business, valuable assets. This fact was established by the Debtor's testimony, was not controverted, and indeed was agreed to by PT&T. Viewed in these circumstances, what the Receiver seeks (and sought to accomplish by his Order of Appointment) is hardly startling.

There is no gainsaying the proposition that the Federal courts have the power to supply an independent common law where bankruptcy is concerned. See generally, Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L.Rev. 1013 (1953); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594-95, 611-12, 613, 652 n.3 (1949). In certain cases in which Congress has, as part of a general statutory scheme, granted jurisdiction to the Federal courts, those courts have been given the power to create Federal common law where they think it is necessary to effectuate Congressional purposes.

In the bankruptcy context, the most trenchant statement of the policy issues to be considered was by Judge Henry Friendly in *Fore Improvement Corp. v. Selig*, 278 F.2d 143 (2d Cir. 1960). He felt that the determinative criterion of whether federal law should be created to govern a bankruptcy case was whether a "policy of the Bankruptcy Act would be offended by treating the trustee in the same way the bankrupt would have been treated in a state court". Judge Friendly generalized: "Of course, Congress is not required to direct the federal courts to look to state law for the definition of state-created rights asserted in bankruptcy, as it is when federal jurisdiction rests solely on diversity of citizenship. *The question is of intent, not of power.*" (278 F.2d at 147) (concurring opinion) (emphasis supplied).

Much the same feeling is present in the seminal article by Professor Hill on the relationship of the doctrine of *Erie Railroad Company v. Tompkins*, [304 U.S. 64 (1932)] to bankruptcy:

> "It has been made clear, however, that the federal courts are not to shrink from applying a 'federal common law' in those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its sources in those statutes, rather than by local law." *Hill, op. cit. supra* at 1033.

These considerations must be determinative in the instant case. It is not for PT&T, not for the California Public Utilities Commission, and not for the courts of California to determine what constitutes "property"

for purposes of the Bankruptcy Act. It is for this Court and this Court alone to make that determination. Two circuits have deferred to the same telephone company and its contract of adhesion, which it denominates "tariffs". It is unthinkable that neither court gave any consideration whatever to the effect which their decisions would have upon the administration of Chapter XI estates.

PT&T is attempting to bludgeon the Receiver into paying all past-due telephone bills owed by the Debtor at the time of the filing of its petition inaugurating these proceedings. Unfortunately, unlike gas, electric or water service, all telephone service is not alike. This is the essential truth which this Court should recognize. After intensive advertising campaigns conducted by the Bell Telephone System, of which PT&T is a part, to have its subscribers "let their fingers do the walking"—a campaign which recognizes the value of the "yellow pages" and the numbers listed there—it is somewhat inconsistent for PT&T now to contend that there is nothing unique in one telephone number over another; that service at one number will supply everything that service at another number would have supplied; and that, therefore, a telephone number is not "property". Social security numbers; taxpayer identification numbers; credit card numbers; checking account numbers; telephone numbers; all of these are vital to everyday existence. Their very importance makes it imperative that we be permitted to retain these numbers; that, in fact, these numbers have become our property. The continued operating success of a debtor depends upon the continued and uninterrupted use of its telephone numbers. A change of number, accompanied by the lack of referral service from old to new number, will

destroy the businesses which receivers attempt to rehabilitate. In light of these truths, how can it be argued that a telephone number is not property either owned by, or in the possession of, a debtor?

In one of the most important and far-reaching legal papers of the 1960's, Professor Charles Reich attempted to demonstrate that the "new property", the "things" needed to create and maintain wealth; among other things, had been transformed from the old touchstones —land, cash, personal chattels—to that which the government dispensed — permits, franchises, licenses, and the like. "Property," he stated, "is not a natural right but a deliberate construction by society." Reich, *The New Property*, 73 Yale L.J. 733, 771 (1964). His thesis was, broadly speaking, that constitutional due process guarantees had to be applied when government attempted to deprive the recipients of these items of governmental largess which government had theretofore granted them. In his conclusion, he recognized the relationship which the largess of certain corporate governments bore to governmental largess:

> "This article is an attempt to offer perspective on the transformation of society as it bears on the economic basis of individualism. The effort has been to show relationships; to bring together drivers' licenses, unemployment insurance, membership in the bar, permits for using school auditoriums, and second class mail privileges, in order to see what we are becoming.
>
> Government largess is only one small corner of a far vaster problem. There are many other new forms of wealth: franchises in private businesses, equities in corporations, *the right to receive privately furnished utilities and services*, sta-

tus in private organizations. These too may need added safeguards in the future.

. . . It is time to see that the 'privilege' or 'gratuity' concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public." (*Id.* at 786-87) (Emphasis supplied).

The Court below (and the court in *Slenderella*) are more in tune with the concepts of the 1920's than with the realities of the 1970's. A telephone number, as mundane as one might think such a thing to be, is every bit as much the property of the Debtor, as important to its livelihood and continued existence, as is its machinery, tools, and equipment. To contend otherwise is to play at Alice in Wonderland. And just as dangerous.

PT&T's unreasonable and arbitrary rules must give way to the paramount jurisdiction of the Bankruptcy Court to enforce the principles and policies of the Bankruptcy Act to effect the rehabilitation of financially distressed debtors and to prevent preferential treatment among creditors.

Since the telephone number is "property" and the telephone numbers in question were in the possession of the Debtor when its Chapter XI Petition was filed, the vacation of the restraining order by the Referee in Bankruptcy was improper and the decision of the District Court affirming the Referee's order of May 25, 1970, should be reversed.

B. The Court Below Erred in Holding That the Bankruptcy Court Does Not Have Summary Jurisdiction to Enjoin Disconnection of Telephone Service.

The Receiver relies, in addition to §70a(5) of the Bankruptcy Act (11 U.S.C. §110a(5)), upon §311 of the Bankruptcy Act (11 U.S.C. §711), which provides that the Chapter XI Court has "exclusive jurisdiction of the Debtor and his property, wherever located."

Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-799) provides an integrated system for the rehabilitation of a financially distressed business. Under the supervision of the Bankruptcy Court, the interests of the various creditors are adjusted and reconciled with the preservation of the enterprise as a going concern. To accomplish this result, the Chapter XI Court is granted broad powers. Consequently, the Bankruptcy Court has exclusive jurisdiction over the administration of the estate and is not at liberty to surrender it. *Magnus v. Miller*, 317 U.S. 178 (1942); *U.S. Fidelity and Guarantee Co. v. Bray*, 225 U.S. 205 (1911).

As noted previously, the telephone service and numbers in question are "property" of the Debtor, both in equity and bankruptcy sense and in the strict legalistic sense. Consequently, the Bankruptcy Court, under §311 of Chapter XI (11 U.S.C. §711), had jurisdiction over the subject matter of this controversy. Essentially, the controversy is one which centers around the payment of the sums claimed by PT&T. The effect of PT&T's procedure is to deprive the Bankruptcy Court of the Congressional grant of authority to adjudicate its claim as a creditor of the Debtor. This follows from PT&T's Rule 23(B), which seeks to compel the Receiver to pay PT&T's unsecured claim in full before PT&T will continue the telephone service

heretofore rendered to the Debtor or permit the Receiver to supersede. The gravamen of this attempt lies not so much in the amount sought to be collected, which could seriously impede and interfere with the Receiver's continued operation of this business, as it does with the fact that the Receiver is prevented from contesting both the validity and the amount of PT&T's claim and in bringing that controversy before the Bankruptcy Court. Moreover, this conduct on the part of PT&T also deprives receivers of their power to affirm or reject executory contracts.

But even if the validity and amount of the Debtor's telephone bill are conceded, still, a utility cannot act with the hubris which has characterized the conduct of PT&T in this case.

The courts have long recognized that the acts of creditors interfering with the rehabilitative aspects of Chapter proceedings (Chapters X and XI) must be restrained for the ultimate benefit of the estate and its creditors. Thus, in Chapter proceedings it has been held that the Court may deny a reclamation petition or a petition to foreclose if, in the Court's opinion, failure to do so would jeopardize the reorganization. *In re Fleetwood Motel Corp.*, 335 F.2d 857 (3d Cir. 1964); *In re United States Realty and Improvement Co.*, 153 F.2d 853 (2d Cir. 1967); *In re Bargain City U.S.A., Inc.*, 212 F.Supp. 111 (E.D. Pa. 1962).

As appeared at the hearing, 97.5% of the Debtor's gross business is attributable to orders initiated and received over the telephone numbers listed to the Debtor by PT&T. It also appears that the Debtor's business would be greatly hampered if the existing telephone service to the pre-bankruptcy numbers were to

be disconnected without referral service. Since the evidence clearly shows that PT&T did not disconnect prior to the Chapter XI proceeding, that the use of the existing telephone numbers is requisite to the successful rehabilitation of this Debtor and that disconnection without referral service would be detrimental to the rehabilitation of this Debtor, the Referee's Order appointing the Receiver and directing the continuation of existing utilities service should never have been vacated, was entirely proper and within the jurisdiction and power of the Referee and the Referee's Order modifying the said Order appointing the Receiver should be reversed.

Conclusion.

A telephone number and its associated service are clearly "property" within the meaning of §70(a)(5) of the Bankruptcy Act (11 U.S.C. §110(a)(5)). Consequently, the Debtor's telephone numbers and the service associated therewith, not having been disconnected prior to the initiation of the within proceeding, were in the possession of the Debtor at the time that it filed its Petition herein and passed into the exclusive jurisdiction of the Bankruptcy Court, as that jurisdiction is conferred and defined by §311 of Chapter XI of the Bankruptcy Act (11 U.S.C. §711).

To hold otherwise would be to recognize a clearly unconscionable and self-serving contract of adhesion exacted by PT&T, the owner and operator of a monopolistic utility, from the Debtor. Such conduct, if condoned, would either permit the destruction of the underlying rehabilitative purposes and policies of the Bankruptcy Act, or permit PT&T to exact payment in full from this Debtor for the privilege of utilizing that which is a necessity if its business is to continue, while

other unsecured creditors face the distinct possibility of receiving substantially less than payment in full on their claims. Such a result violates the basic precept of the Bankruptcy Act that creditors shall be treated equally with respect to their claims. Such a result would deprive the Bankruptcy Court of the duty imposed upon it by Congress to adjudicate the validity and the amount of creditor claims.

The abhorrent result is that preferential treatment is condoned, if not made the ideal, and the administration of estates under the Bankruptcy Act is impeded and delayed, all to the ultimate disadvantage of the creditors of the estate. PT&T's unreasonable and arbitrary rules must give way to the paramount jurisdiction of the Bankruptcy Court to enforce the principles and policies of the Bankruptcy Act.

For these reasons, we respectfully submit, this Court should grant a Writ of Certiorari.

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APPENDIX.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

In the Matter of Best Re-Manufacturing Co., a corporation, doing business as Bonded Engine Company, Debtor. In Proceedings for an Arrangement. No. 62236.

The Order to Show Cause Why Order of October 16, 1969 Directing Continuance of Public Utility Services Should Not be Modified came on regularly for hearing on April 1, 1970 before the Honorable Russell B. Seymour, Referee in Bankruptcy. Messrs. Lawler, Felix & Hall by Richard D. DeLuce, Esq., appeared as counsel for the Petitioner, The Pacific Telephone and Telegraph Company, and Messrs. Gendel, Raskoff, Shapiro & Quittner by Nathan Markowitz, Esq. appeared as counsel for the Respondent, Don Rothman, Receiver in the above matter, appointed in the place of A. J. Bumb, Trustee in the above matter, deceased.

The Court having received the stipulation of the parties and having considered the records and papers in the cause and the arguments of the respective counsel thereon, and the cause having been submitted to the Court for consideration and decision, the Court after deliberation thereon makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The Pacific Telephone and Telegraph Company is a public utility corporation duly organized and existing under and by virtue of the laws of the State of California and engaged in the business of render-

ing telephone and telegraph service to its subscribers and to the public generally in the County of Los Angeles, State of California, and elsewhere.

2. The business of The Pacific Telephone and Telegraph Company, hereinafter referred to as "Petitioner," of rendering telephone service and other communications services in the State of California is conducted pursuant to tariffs, rules and regulations on file with the Public Utilities Commission in the State of California, and with the Federal Communications Commission.

3. Prior to October 16, 1969 Best Re-Manufacturing Co., a corporation, hereinafter referred to as "Debtor," subscribed for, and Petitioner installed, telephone service under telephone numbers 232-3202, 232-0858, 231-0835 and 128-1620 at 1100 East Slauson, Los Angeles, California, and 233-7348 under the name Bonded Engine Company at San Diego, California.

4. There remains past-due from Debtor to Petitioner at least the sum of $2,000 for telephone service furnished by Petitioner to the Debtor pursuant to a contract in connection with the said telephone service rendered by Petitioner to the Debtor over the foregoing telephone numbers prior to October 16, 1969.

5. Debtor filed its petition for an arrangement under Chapter XI of the Bankruptcy Act on October 14, 1969 and A. J. Bumb was duly appointed as Receiver on October 16, 1969, and following his death on March 24, 1970 Don Rothman was appointed Receiver. By the order of October 16, 1969 the Receiver was authorized to continue to operate, manage and control the business of the Debtor, which comprises the re-

manufacture and reconditioning of used automotive engines and the resale to others for ultimate sale to the general public.

6. Debtor's customers have consistently reached the Debtor for the transaction of business at the telephone numbers set forth above and continue to call the Debtor's place of business at said telephone numbers. Debtor's business will be interrupted and dislocated to some extent if service is discontinued over the above described telephone numbers. A business established for awhile does acquire a certain good will because of a telephone number, which number becomes important to the business, although telephone numbers are changed from time to time for reasons beyond the control of the subscriber.

7. Petitioner's tariffs, rules and regulations provide that Petitioner may discontinue the Debtor's telephone service for the nonpayment of sums due for telephone service rendered prior to October 16, 1969.

8. Petitioner's tariffs also provide in Rule 17 of Tariff 36-T that a subscriber has no proprietary right in the telephone number.

9. Petitioner has been and is agreeable to furnishing telephone service to the Receiver under the same telephone numbers issued to the Debtor only if the Receiver supersedes to the telephone service theretofore rendered to Debtor and makes an arrangement acceptable to Petitioner to pay outstanding charges against Debtor in accordance with Rule and Regulation No. 23 of Petitioner's Tariff 36-T on file with the California Public Utilities Commission; that Petitioner has at all times been willing to furnish telephone service to the Receiver under different telephone numbers from

those of said Debtor without requiring the payment of any part of said sum and without any referral of telephone calls from the present telephone numbers of Debtor to any new telephone numbers for Receiver.

10. Receiver obtained on October 16, 1969, as part of the order appointing him Receiver in this matter, an order, the pertinent portion of which reads as follows:

> "IT IS FURTHER ORDERED that all utility companies presently supplying utilities and or services to the above entitled debtor shall continue to supply said services to the said receiver which said services shall from the date of the receiver's qualification and taking over possession constitute administrative expenses of the estate, said services to be continued and not terminated until further order of this court."

11. Said tariffs, rules and regulations show that the telephone numbers used by the Debtor are not in the possession of the Court and Petitioner has asserted a bona fide claim adverse to the Respondent. The Court, therefore, does not have summary jurisdiction to issue that portion of the order referred to above as it pertains to Petitioner.

12. This Court does not have jurisdiction to summarily compel Petitioner to continue service over the same telephone numbers when Petitioner otherwise can discontinue service over said telephone numbers for nonpayment of charges incurred prior to the appointment of the Receiver on October 16, 1969.

13. Said order of October 16, 1969 should be modified by adding the following thereto:

> "This order does not prohibit disconnection of telephone numbers of debtor for nonpayment of charges incurred prior to October 16, 1969 provided receiver receives telephone service over other telephone numbers."

14. Petitioner advised Receiver that it requires him to pay the past-due telephone bills for service incurred by the Debtor prior to the initiation of the bankruptcy proceeding and that the Receiver supersede to the telephone numbers utilized by the Debtor. Petitioner has advised the Receiver that upon his failure to comply with the foregoing, telephone service to the numbers heretofore used by and listed to the Debtor will be discontinued and that telephone calls made to those numbers will not be referred to any new telephone numbers obtained by the Receiver.

15. On October 16, 1969 the telephone numbers used by and listed to the Debtor prior to the inception of the bankruptcy proceeding had not been disconnected by the Petitioner, were in full service, and were being used by the Debtor.

16. Petitioner did notify the Debtor in writing on October 9, 1969 that telephone service to telephone number 232-3101 would be discontinued for nonpayment of bills rendered for that service and Petitioner gave similar written notification concerning number 232-0858 on October 30, 1969.

17. That Respondent has offered to pay, and the order of October 16, 1969 directs Respondent to pay, the current operating and service charges to Petitioner to maintain service on said telephone numbers. Petitioner has refused to maintain such service under such conditions and has likewise refused to give referral service to Respondent on any new telephone numbers unless Respondent makes an arrangement satisfactory to Petitioner to satisfy the amounts due for telephone service incurred prior to filing of the petition for an arrangement under Chapter XI.

18. The telephone equipment on Debtor's premises is owned by Petitioner and in order for Petitioner to render the same telephone service to Debtor over the same telephone numbers no additional equipment is needed on the premises. However, in order for Petitioner to render any telephone service to the Debtor, Petitioner has other equipment and facilities located elsewhere such as, but not limited to, its central offices which equipment and facilities are not located on the Debtor's premises.

19. If telephone service over the same telephone number or numbers is continued by Petitioner to the Debtor or Respondent, no change would be necessary in Petitioner's central office equipment. However, if the telephone number or numbers are changed, it would be necessary for Petitioner to make changes in its central office equipment, although no change would be necessary in the telephone equipment located on the Debtor's premises.

20. Respondent has not requested any enlargement or change in the telephone service heretofore rendered to Debtor.

21. While there is no tariff, rule or regulation that specifically mentions giving referral service to the Respondent should Respondent desire one or more new telephone numbers and refuse to pay for services rendered to Debtor prior to the commencement of the bankruptcy proceeding, any such referral service would be equivalent to Respondent retaining the use of the telephone number used by Debtor without the Respondent complying with the rule governing supersedure. Furthermore, Petitioner may under its tariffs disconnect telephone service for failure to pay bills for service. A customer who has had his service disconnected for nonpayment is required to pay any unpaid balance due in order to restore his former service to the same premises. In addition, an applicant for service who has had his service disconnected for non-payment of bills is required to pay any unpaid balance in order to obtain new service. The customer whose service was previously disconnected for nonpayment of bills is required to pay any unpaid balance previously incurred in order to retain his present service. Since customers whose service has been disconnected for nonpayment of bills cannot restore their former service, or obtain or retain new service without payment of outstanding bills, such customers do not receive referral service without such payment. The tariff governing supersedure procedure is the only tariff covering the situation in which a new applicant for service desires to obtain service through a number in use.

22. Petitioner's tariffs, their content and import, were not exhibited to or called to the attention of the Debtor at the time that the Debtor subscribed to and for its existing telephone service.

23. Petitioner is given the exclusive right to render telephone service in the areas within the State of California designated by the California Public Utilities Commission, and it is the only source from which Debtor can obtain telephone service in the geographical area in which the Debtor's place of business is located.

24. At the time of the filing of the petition for an arrangement under Chapter XI, Petitioner did not hold any property of the Debtor to secure payment of the money due Petitioner for the prebankruptcy telephone services.

25. In the event of an adjudication, it is likely that the dividend to unsecured creditors would be less than 100 cents on the dollar.

CONCLUSIONS OF LAW

1. There remains past-due from Debtor the sum of at least $2,000 incurred for telephone service under telephone numbers 232-3101, 232-0858, 231-0835 and 128-1620 in Los Angeles, California, and 233-7348 in San Diego, California.

2. That under Petitioner's tariffs, rules and regulations on file with the California Public Utilities Commission, Petitioner can discontinue said telephone service for the nonpayment of sums due for telephone service rendered prior to October 16, 1969.

3. That under Petitioner's tariffs, rules and regulations as filed with the California Public Utilities Commission a subscriber has no proprietary right in a telephone number.

4. This Court does not have summary jurisdiction to issue that portion of its order of October 16, 1969 as it pertains to Petitioner reading as follows:

> "IT IS FURTHER ORDERED that all utility companies presently supplying utilities and or services to the above entitled debtor shall continue to supply said services to the said receiver which said services shall from the date of the receiver's qualification and taking over possession constitute administrative expenses of the estate, said services to be continued and not terminated until further order of this court."

5. This Court does not have summary jurisdiction to compel Petitioner to continue telephone service over the same telephone numbers to the Receiver when there remains past-due charges for telephone service incurred prior to the bankruptcy proceeding.

6. Said order of October 16, 1969 should be modified by adding the following thereto:

> "This order does not prohibit disconnection of telephone numbers of debtor for nonpayment of charges incurred prior to October 16, 1969 provided receiver receives telephone service over other telephone numbers."

DATED: May 25, 1970.

/s/ RUSSELL B. SEYMOUR
Referee

Judgment.

United States District Court, Central District of California.

In the Matter of Best Re-Manufacturing Co., a corporation, doing business as Bonded Engine Company, Debtor. In Proceedings for an Arrangement No. 62236.

This cause came on regularly for hearing on April 1, 1970 before the Honorable Russell B. Seymour, Referee in Bankruptcy. Messrs. Lawler, Felix & Hall by Richard D. DeLuce, Esq. appeared as counsel for Petitioner, The Pacific Telephone and Telegraph Company, and Messrs. Gendel, Raskoff, Shapiro & Quittner by Nathan Markowitz, Esq. appeared as counsel for Respondent, Don Rothman, Receiver in the above matter, appointed to succeed A. J. Bumb, Trustee in the above matter, deceased.

The Court having heard the stipulation of the parties in open court and having considered the same and the records and papers in the cause and the evidence of the parties and the arguments of the respective counsel thereon, the cause having been submitted to the Court for consideration and decision, the Court having made and separately stated its written findings of fact and conclusions of law, files this its decision in writing and order that judgment be made herein granting Petitioner's petition.

WHEREFORE, by reason of the law and the findings aforesaid, it is

ORDERED, ADJUDGED AND DECREED that the order of this Court of October 16, 1969 appoint-

ing A. J. Bumb as Receiver shall and the same is hereby modified by adding thereto the following:

"This order does not prohibit disconnection of telephone numbers of debtor for nonpayment of charges incurred prior to October 16, 1969 provided receiver receives telephone service over other telephone numbers."

DATED this 25th day of May, 1970.

/s/ RUSSELL B. SEYMOUR
Referee

Judgment.

United States District Court, Central District of California.

In the Matter of Best Re-Manufacturing Co., Debtor. In Proceedings for an Arrangement under Chapter XI. No. 62236-JWC.

This cause came on regularly for hearing on September 9, 1970 before the Honorable Harry C. Westover, Judge presiding, Messrs. Lawler, Felix & Hall by Richard D. DeLuce, Esquire appeared as counsel for The Pacific Telephone and Telegraph Company, and Messrs. Gendel, Raskoff, Shapiro & Quittner by Nathan Markowitz, Esquire, appeared as counsel for Receiver, Don Rothman.

The Court having considered the records and papers in the cause and the arguments of the respective counsel thereon, and the matter having been submitted to the Court for consideration and decision, and the Court having adopted the Findings of Fact and Conclusions of Law of Russell C. Seymour, Referee in Bankruptcy, filed herein on May 25, 1970.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the order of May 25, 1970 by Russell C. Seymour, Referee in Bankruptcy, shall be and the same hereby is affirmed.

/s/ HARRY B. WESTOVER
Judge of the District Court

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

In the Matter of Best Re-Manufacturing Co., Debtor.

Don Rothman, Receiver, Appellant, vs. The Pacific Telephone and Telegraph Company, Petitioner, Appellee. No. 26,738.

[December 8, 1971].

On Appeal from the United States District Court for the Central District of California.

Before: BARNES and MERRILL, Circuit Judges, and CROCKER, District Judge*

PER CURIAM:

The question here presented is whether, in arrangement proceedings under Chapter XI of the Bankruptcy Act (§§301-399), 11 U.S.C. 702-799, Pacific Telephone and Telegraph Company can summarily be ordered to provide service to the receiver under the telephone number currently being used by the debtor. The Referee refused to enter such an order and, on petition for review, the District Court affirmed. This appeal was then taken. We affirm.

The Telephone company is perfectly willing to provide service to the debtor under a new number and has, indeed, submitted without opposition to an order that it do so. It rebels, however, against having to provide service under the old number until satisfactory

*Honorable M. D. Crocker, United States District Judge for the Eastern District of California, sitting by designation.

arrangements have been made for taking care of sums owing to it by the debtor.

Rules and regulations respecting the telephone company as filed with the Public Utilities Commission of the State of California support the telephone company. They deal with conditions under which a new customer (here the receiver) may "supersede the service of a subscriber discontinuing that service." This may be done "where an arrangement acceptable to the company is made to pay outstanding charges against the service."

The receiver protests that continuation of debtor's old telephone number is of vital importance to the debtor's arrangement, as the greater part of its business is initiated by telephone calls; that to submit to the telephone company's "supersedure" requirements is to permit it to coerce preferential treatment of the debt owing to it by the debtor.

The telephone company responds that the Bankruptcy Court is without summary jurisdiction to act in this matter, since the dispute does not involve property of the debtor in possession of the receiver, and resolution of the dispute, accordingly, must be by plenary action.

Such was the holding in *Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co.*, 268 F.2d 488 (2d Cir. 1960), a case involving the same telephone company and the same rules and regulations. There the court concluded that the old tele-

phone number did not itself constitute property (the existence of any property right in a number is denied by applicable rules and regulations); that right to the number was not "possessed" by the debtor so as to give summary jurisdiction to protect possession[1] that even if a contract right to continued service might arguably exist, a dispute as to the extent of contract obligations must be resolved by plenary action.[2]

We agree with this analysis of the limits of summary jurisdiction.

Judgment affirmed.

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[1]We are not called upon to decide whether "possession" or "ownership" or both suffice to predicate summary jurisdiction in Chapter XI. See 8 *Collier* 166-182. *See also, In Re Barasch*, 439 F.2d 1393 (9th Cir. 1971). In the instant case, debtor had neither "possession" (actual or constructive) nor "ownership" of the telephone number.

[2]The fact that the telephone company is a public utility does not alter this conclusion. Such only implies that contracts with the company are regulated by public authority.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1137

In the Matter of

BEST RE-MANUFACTURING COMPANY,
Debtor.

DON ROTHMAN, Receiver,
Petitioner,

vs:

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1137

In the Matter of

BEST RE-MANUFACTURING COMPANY,
Debtor.

DON ROTHMAN, Receiver,
Petitioner,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.

Preliminary Statement.

This case does not present any important or novel questions.

There is no question as to petitioner's right to receive telephone service nor is there any question as to petitioner's right to maintain a plenary action. The sole issue determined by the Court of Appeals was that the bankruptcy court did not have jurisdiction to act *summarily* in the controversy. The court expressly pointed out that the controversy could "be resolved by a plenary action" (Appx. To Pet., p. 15).